AUG 7 1972
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

NO: 71-575

L..... G....., INDIVIDUALLY AND AS NEXT FRIEND OF Z..... G.....,

APPELLANTS

VS

F..... O..... P.....,

APPELLEE

ON APPEAL FROM THE COURT OF CIVIL APPEALS FOR THE FOURTH SUPREME JUDICIAL DISTRICT OF TEXAS

APPELLANTS' BRIEF ON THE MERITS

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ON APPEAL FROM THE COURT OF CIVIL APPEALS FOR THE FOURTH SUPREME JUDICIAL DISTRICT OF TEXAS

BRIEF FOR APPELLANTS

OPINIONS BELOW

The majority and dissenting opinions of the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas are reported at 466 S.W. 2d 41, and the full texts of which are respectively contained at pages 45 through 48 and pages 49 through 58 of the Record.

The Court of Civil Appeals wrote no opinion in denying the Appellants' Motion for Rehearing, but its endorsement on the face of Appellants' Motion for Rehearing overruling same is set forth at page 38 of the Record. The Supreme Court of Texas wrote

no opinion in denying discretionary review, but its notification denying the Application for Writ of Error is found at page 4 of the Record. The 150th District Court of Bexar County, Texas, wrote no opinion but the judgment of that Court is found at page 112 through 113 of the Record.

JURISDICTION

Appellants present this matter to the Supreme Court on appeal from the decision of the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas. That decision affirmed the holding of the District Court of Bexar County, 150th Judicial District, in which the validity of certain statutes of the State of Texas were upheld in spite of the contentions of appellants that the said statutes are repugnant to the United States Constitution.

The decision of the Fourth Court of Civil Appeals was dated March 10, 1971. Further review in the Court of Civil Appeals was refused on April 7, 1971, at which time the Court overruled Appellants' application for rehearing.

Appellants then filed a timely application for Writ of Error to the Supreme Court of the State of Texas. That Court, on the 28th day of July, 1971, refused the Writ, finding "no reversible error". Therefore, under Texas law, on the 28th day of July, 1971, the decision of the Court of Civil Appeals became the decision of the highest Court of the State of Texas to which Appellants could present their contentions.[1]

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1. On the question of the judgment of the Court of Civil Appeals for the Fourth Supreme Judicial District being a final judgment of the highest Court of Texas when the State Supreme Court declines discretionary review by refusing the Application for Writ of Error finding "no reversible error," see the following cases: **Bacon v. Texas,** 163 U.S. 207 (1896); **Sullivan v. Texas,** 207 U.S. 416 (1908); **San Antonio & A.P.R. Co. v. Wagner,** 241 U.S. 476 (1916). For other cases sustaining the jurisdiction of this Court see: **Lake Erie and W. Ry. v. State,** 249 U.S. 422 (1919); **Connecticut General Life Insurance Co. v. Johnson,** 303 U.S. 77 (1938); and **Doty v. Love,** 295 U.S. 64 (1935)."

Accordingly, on the 26th day of August, 1971, Appellants filed Notice of Appeal to the Supreme Court of the United States with the Clerk of the Court of Civil Appeals for the Fourth Supreme Judicial District of the State of Texas.

The Notice of Appeal filed in the Court below is pursuant to 28 U.S.C. 1257(2).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The Texas statutes involved are:

(1) Section 4.02, Chapter Four, Texas Family Code, Vernon's Annotated Texas Statutes,

Duty to Support

Each spouse has the duty to support his or her minor children. The husband has the duty to support the wife, and the wife has the duty to support the husband when he is unable to support himself. A spouse who fails to discharge a duty of support is liable to any person who provides necessaries to those to whom support is owed.

(2) Article 602 Texas Penal Code, Vernon's Annotated Texas Statutes:

Desertion of wife or child

Any husband who shall wilfully desert, neglect or refuse to provide for the support and maintenance of his wife who may be in necessitous circumstances, or any parent who shall wilfully desert, neglect or refuse to provide for the support and maintenance of his or her child or children under eighteen years of age, shall be guilty of a misdemeanor, and upon conviction, shall be punished by confinement in the County Jail for not more than two years.

(3) Article 602a, Texas Penal Code, Vernon's Annotated Texas Statutes:

Subsequent conviction for desertion of
wife or child; leaving state

Any husband who has been convicted of the misdemeanor offense of deserting, neglecting or refusing to provide for the support and maintenance of his wife who may be in necessitous circumstances, or any parent who has been convicted of the misdemeanor offense of deserting, neglecting, or refusing to provide for the support and maintenance of his or her child or children under eighteen years of age, and who shall thereafter wilfully desert, neglect or refuse to provide for the support and maintenance of his or her child or children under eighteen years of age, shall for each and every subsequent such violation be guilty of a felony; any husband who shall wilfully desert, neglect, or refuse to provide for support and maintenance of his wife who may be in necessitous circumstances, or any husband who shall wilfully desert, neglect, or refuse to provide for the support and maintenance of his child or children under eighteen years of age, and who shall desert said wife or children by leaving the State of Texas and by going into some other state, shall be guilty of a felony; and upon conviction shall be punished by confinement in the County Jail not less than ten days nor more than two years, or by confinement in the State Penitentiary for not more than five years.

(4) Article 1, Vernon's Annotated Texas Statutes:

The common law of England, so far as it is not inconsistent with the Constitution and laws of this State, shall together with such Constitution and laws, be the rule of decision, and shall continue in force until altered or repealed by the Legislature.

The constitutional provisions involved are:

(1) The Equal Protection clause of the Fourteenth Amendment to the United States Constitution:
"... nor shall any State ... deny to any person within its jurisdiction the equal proctection of the laws."

(2) The Due Process clause of the Fourteenth Amendment to the United States Constitution:
". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . ."

QUESTION PRESENTED

The Courts of the State of Texas in the application of the common law, as statutorily adopted in Article 1, Vernon's Annotated Texas Statutes, and their interpretations thereof pursuant to Articles 602 and 602a, Texas Penal Code, Vernon's Annotated Texas Statutes and Article 4.02, Chapter 4, Texas Family Code, have consistently ruled that there is no legal liability on the part of a natural father of an illegitimate child to support such child in spite of his legal obligations for the support and maintenance of those children which have been classified and categorized by fate and fortuity as "legitimate".

An additional consequence of the foregoing application results in the entire burden of maintaining and supporting the illegitimate child being placed on his mother, while his father escapes all legal and financial obligations toward him.

The question presented is whether the "Texas rule" is unconstitutional as violating the due process and the equal protection clauses of the Fourteenth Amendment to the Constitution of the United States, insofar as it grants to the legitimate child the right to require support and maintenance from his natural father while denying the illegitimate child the right to require his natural father to so maintain and support him; thereby imposing the entire burden for such maintenance and support on the female partner to the extramarital union.

STATEMENT OF THE CASE

Appellants came before the trial court by means of a petition asking that Francisco Ocasio Perez, Appellee, be found by the court to be the natural father of Zoraida Gomez, and further asking the court to order Appellee to pay a reasonable amount toward the support of said illegitimate child during her minority. Appellants' petition is set forth at pages 97 and 98 of the Record.

Appellant, Linda Gomez, testified that she first became acquainted with Appellee in June of 1968 at a party given by mutual friends. At the time of their meeting, she was unmarried and Appellee told her he was also unmarried. In fact, Appellee was lawfully married to someone else as of the date of the filing of this case. Thereafter Appellant became intimate with Appellee, and in June of 1969 a child, Zoraida Gomez, was born of their relationship. The trial court found that Appellee was the natural father of Zoraida Gomez and that Appellant was the natural mother. Further, the court found that the illegitimate child needed the support and maintenance of Appellee and that Appellee was able to give such support, but that he has refused and failed to do so. However, the trial court held that Appellee, the natural father of Zoraida Gomez, has no civil liability to support said illegitimate child. (R-112, 113).

The judgment of the trial court was contrary to the position presented by Appellants during the hearing on the merits — that Texas law, which denies liability on the part of a natural father to support and maintain an illegitimate child, deprives said child of his rights under the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution. Further, such deprivation is to the injury of the natural mother as well because the entire burden of support and maintenance is, in effect, placed on her.

The same claim was again raised by Appellants in their brief before the Court of Civil Appeals for the Fourth Supreme Judicial Ditsrict of Texas. That court considered the issue and rejected Appellants' constitutional contentions. Appellants' constitutional argument was not without recognition, however, for a dissenting opinion by Justice Carlos Cadena, Associate Justice of the Court of Civil Appeals, spoke directly to, and in favor of Appellants' claims. (R - pp. 50 through 58). Appellants preserved this point in the Motion for Rehearing in the Court of Civil Appeals which was denied. The Application for Writ of Error to the Supreme Court of Texas again raised this point, but the Court denied discretionary review.

SUMMARY OF ARGUMENT

The State of Texas, in statutorily adopting the common law of England, has engaged in a consistent policy of depriving the illegitimate child of the right to seek paternal support. Through "action of silence" by the State legislature and through the affirmance of the State courts, Texas has continued a policy of senseless differentiation between legitimate and illegitimate children, granting the former class the right to paternal support while denying this important right to the latter class.

Such a discriminatory classification of children, based solely on the fortuitous circumstances of birth contravenes the equal protection clause of the Fourteenth Amendment to the Constitution of the United States. Texas has no valid justifiable interest for perpetuating this archaic inequity. This Court in several recent opinions concerning the rights of illegitimates, one of which has been characterized by some as a deviation from the principles enunciated in the others (a characterization with which we do not agree), has consistently forbidden states from devising irrational schemes to prevent the illegitimate from seeking satisfaction of his

needs through parental support. Similarly here, the illegitimate has the right to be recognized as a child with respect to an equal application of those state laws designed to insure parental support of children.

In applying its discriminatory dichotomy, Texas has acted so as to protect the "more favored" male while placing the entire burden of supporting the illegitimate on the "less favored" female. Again the State can demonstrate no rational relation for this differential treatment other than out-worn concepts of morality and prejudice based on sex. This Court has held such a classification to be in violation of the equal protection clause.

In effect, Texas has created an insurmountable barrier which absolutely deprives the illegitimate from securing paternal support. The State has woven a fabric of incongruous laws geared solely to protect the undeserving male and to punish the more deserving child. Under the fantasized arguments of "problems of proof" Texas has maintained its prejudicial position by refusing to confront and resolve paternal evidentiary issues for support purposes which it daily confronts and resolves for other purposes. Hence the illegitimate child is denied due process of law.

Granting illegitimate children the right to seek and obtain paternal support would neither contradict this Court's decisions in the area of Welfare law, nor would it result in vast numbers of such children losing their AFDC benefits.

ARGUMENT

I.

The right to seek and obtain paternal support, a significant element of a child's right to life from which the bastard has been historically barred, is an important right that Texas law has persistently granted to a legitimate child, but denied to an illegitimate child solely because of the fortuitous circumstances surrounding his birth, circumstances patently beyond his control.

Just as the fetus clings to its mother's umbilical cord for sustenance, so clings the infant to the "umbilical cord" of his parents' affection and nurture — that "line of life," once severed, leaves the child exposed to society's capricious winds of fortune. Clearly, as among all of the varied species of this earth, there are none where the offspring are born so completely helpless and remain so overwhelmingly dependent upon their parents for such a long period of time as is the child of man. Indeed, the word "infant" stems from the Latin derivative *infans*, which according to *Webster's New Collegiate Dictionary* means "incapable of speech," hence a recognition of the child's total dependence. In what manner has the State of Texas spoken for these speechless children?

> When the word "child" or "children" is used in a statute (unless the statute clearly reflects the contrary), it means a legitimate child or children only . . . while there is some conflict of authorities upon the meaning of the word "child" when used in a statute, deed, or will . . . the decided weight of authority is in favor of the construction that the use of such word refers alone to legitimate children. *Beaver v. State*, 96 Tex. Cr. R. 179, 256 S.W. 929 (1923).

The foundation of the present Texas law, whereby an illegitimate child is deprived of his right to seek and obtain support

from his natural father, rests in Article 1 of Vernon's Annotated Texas Statutes. By this statute, Texas has statutorily adopted the common law of England as the rule of decision in this State. It is on this foundation that the Texas courts, in their interpretation of Articles 602 and 602a of the Penal Code as well as Section 4.02 of the Family Code, have consistently held the deprivation of the illegitimate child's right to paternal support to be a continuing part of the Texas juridical heritage.

In *Beaver v. State, supra.*, the Texas Court of Criminal Appeals, in conjunction with engrafting the common law rule on what is presently Article 602 of the Penal Code, stated the following as a basis and justification for its decision:

> The rule of the common law has been so long established and so uniformly recognized that until the Legislature speaks in unmistakable terms showing an intention to change the rule in this State, we must perforce hold that the statute in question does not apply in the present instance.

As recently as 1965, the Texas Supreme Court entertained the opportunity to re-examine this antiquated rule regarding illegitimate children, and again it reaffirmed and preserved the common law dichotomy, stating: ". . . here a father is not under a common law or statutory duty[2] to support his illegitimate child." *Home of Holy Infancy v. Kaska*, 397 S.W. 2d 208, 210 (1965)

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2. It is interesting to note that in Articles 602 and 602a of the Penal Code, the word "husband" is used to describe one's duty toward his spouse, whereas the parallel teminology employed to describe one's duty toward his child is somewhat broader, e.g. ". . . **any parent** who **shall** . . . refuse to support **his or her child** . . ." (Article 602) and ". . . **any parent** . . . refusing to provide for the support of **his** or **her child** . . ." (Article 602a). Clearly the language utilized in these statutory provisions is capable of being interpreted to cover any child, whether born in or out of wedlock. However, the Texas Courts, rather than apply such an interpretation which would more aptly fulfill the legislative purpose of insuring parental support for children, have instead followed the senseless, prejudicial ostracism of the bastard.

The State of Texas in 1969, this time through its legislative branch, a g a i n was provided the opportunity to re-examine and abrogate its traditional deprivation of the illegitimate's right to paternal support. Again Texas chose not to abolish this antiquated dichotomy. This is evidenced by the relevant provision of Section 4.02 of the Family Code which defines the obligation of parental support in terms of ". . . **each spouse** (having) the duty to support his or her minor children." *Emphasis added.* By its very terms, the obligation of paternal support is imposed only upon fathers of legitimate children.[3]

Thus Texas, through its judicial or legislative machinery, or a combination of both, has persistently reaffirmed the basic premise of *Beaver v. State, supra.*, and in so doing has effectively denied the right of an illegitimate child to demand paternal support. With respect to this most important right, the illegitimate c h i l d is relegated to the position of a non-entity under Texas law.

II.

The Texas scheme, which g r a n t s to the legitimate child, but deprives to his illegitimate counterpart, the right to seek and obtain paternal support constitutes a denial of equal protection of the law under the Fourteenth Amendment to the United States Constitution.

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3. If the state legislature by its enactment of Section 4.02 of the Family Code has stated the width and breadth of the rights of illegitimates to parental support, has not the legislature then also abrogated the obligation of maternal support for illegitimates? This result must follow if parental support obligations depend exclusively on spousal circumstances. Conversely, if the term "spouse" is construed to include maternal "non-spousal" parents of illegitimates, then what rational basis can exist for the State's discrimination against the female parent so as to impose liability on her, liability from which the male parent totally escapes? Clearly the maternal obligation of supporting the illegitimate is recognized in Texas, at least prior to the enactment of Section 4.02 of the Family Code. See **Galveston H. & S.A. Ry. Co. v. Walker,** 106 S.W. 705, writ refused (C.A. 1907).

As Appellants have clearly established, there is no legally recognized duty on the part of a natural father to support his illegitimate children. *Home of Holy Infancy v. Kaska, supra.; Beaver v. State, supra.; Lane v. Phillips,* 69 Tex. 240, 6 S.W. 610 (1887). That the action of the State of Texas in refusing to recognize such a duty is "State Action" within the meaning of the equal protection clause of the Fourteenth Amendment to the United States Constitution has been cleary demonstrated. *Shelley v. Kraemer,* 334 U.S. 1, 15 (1948).

Appellants, of course, do not dispute that a state has broad power to establish certain social classifications, and perhaps, this is particularly true with respect to that body of law concerning familial relations, an area traditionally within the ambit of state power. However, even here, the prohibitions of the Fourteenth Amendment must apply, and in drawing such lines or making such distinctions, a state must be mindful of the equal protection clause, and it is forbidden to create and perpetuate a classification which constitutes an invidious discrimination toward a partcular class. *Levy v. Louisiana,* 391 U.S. 68 (1968); *Skinner v. Oklahoma,* 316 U.S. 535 (1942); *Griswold v. Connecticut,* 381 U.S. 479 (1965).

The test is whether the state's classification is based upon a difference which bears a substantial, reasonable and just relation to the object for which it is proposed. *Skinner v. Oklahoma, supra.; Brown v. Board of Education,* 347 U.S. 483 (1954); *Ashbury Hospital v. Cass County,* 326 U.S. 207 (1945). Irrespective of whether the classification is a novel creation, or as asserted by the State, a "long recognized principle in the jurisprudence of the State of Texas", the fact that the challenged law applies uniformly to all illegitimate children is of no consequence. This Court has held that:

> The Equal Protection Clause requires more of a state law than nondiscriminatory application within the class it establishes . . . it also imposes a requirement of some rationality in the nature of the class singled out . . . . The Equal Protection Clause does require that in defining a class subject to legislation, the distinctions that are drawn have "some relevance to the purpose for which the distinction is made" . . . *Rinaldi v. Yeager*, 384 U.S. 305, 308-309 (1966).[4]

Further, in regard to the "tradition" of the principle under attack, it must be stated that common law principles, when reviewed in the light of constitutional challenges, are entitled to no special consideration or sanctity. *Shelley v. Kraemer, supra.*, 17, 18.

Appellants will show that Texas, in depriving illegitimates of the right to require paternal support, has discriminated against the illegitimate child in contravention of the equal protection clause, because this action bears no logical or rational relation to, nor does it promote any justifiable purpose in the familial area of Texas jurisprudence.

A. The dichotomy which Texas law applies to children, by denying the illegitimate child the right to seek and obtain paternal support, is invidious discrimination without any valid State purpose, and thereby contravenes the equal protection clause.

Appellants do not attack all manners of discrimination between legitimates and illegitimates in the State of Texas, but rather limit their inquiry to the sole contention that the deprivation of the right to paternal support, which is, perhaps, the most important

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4. For additional cases stating the Equal Protection test also see: **Harper v. Virginia Board of Elections**, 383 U.S. 663 (1966); **Morey v. Doud, 354 U.S.** 457 (1957); **Metropolitan Cas. Ins. Co. v. Brownell**, 294 U.S. 580 (1935); **Lindsley v. National Carbonic Gas Co.** 220 U.S. 61 (1911).

right which Texas grants to legitimate children, but denies to illegitimate children, has such serious consequences as to constitute an unreasonable and invidious discrimination. Any inquiry into the irrationality of such discrimination must logically begin with an analysis of *Levy v. Louisiana, supra.*

Irrespective of the State's attempt to relegate the bastard to that of a "non-entity" regarding the obligation of paternal support, there can be no doubt that an illegitimate child is a "person" within the meaning of the equal protection clause. *Levy v. Louisiana, supra.*, at page 70. In *Levy* this Court struck down the provisions of the Louisiana wrongful death statute which denied an illegitimate child the right to recover for the wrongful death of his mother.[5]

Speaking for six members of the Court, Justice Douglas stated:

> We start from the premise that illegitimate children are not "non-persons." They are humans, live, and have their being. They are clearly "persons" within the meaning of the Equal Protection Clause of the Fourteenth Amendment. *Levy v. Louisiana, supra.* at page 70.

The Court in *Levy* held that "Legitimacy or illegitimacy of birth has no relation to the nature of the wrong allegedly inflicted on the mother." *supra.* at page 72. Similarly, a child's status at birth has no relation to the State's interest of insuring parental

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5. At the same time the Court also considered the case of **Glona v. American Guarantee & Liability Insurance Co.**, 391 U.S. 73 (1968). That case dealt with the opposite situation presented in **Levy.** The Court invalidated a provision of the same statute which deprived a woman of the right to recover for the wrongful death of her illegitimate child. Since **Levy** is primarily concerned with the child's right whereas **Glona** deals with the mother's right, for the purposes of this portion of the brief, we believe **Levy** to be the more applicable case.

support for all children within its jurisdiction.[6] To base a classification on the mere accident of birth has no more relevancy than to differentiate on the incidence of race or ancestry. *Brown v. Board of Education, supra.; Korematsu v. United States,* 323 U.S. 214, 216 (1944); *Sweatt v. Painter,* 339 U.S. 629 (1950); *Loving v. Virginia,* 388 U.S. 1 (1967).

Admittedly, the actual holdings in *Levy* and *Glona* are capable of a narrower interpretation, doing no more than equalizing the position of legitimate and illegitimate children *vis-a-vi* their mother. However, as Judge Cadena pointed out in his dissent (R. 52) ". . . the Supreme Court of Louisiana, on remand of *Levy* from the United States Supreme Court, assumed that the decision was not limited to the mother-child relationship." Regardless, there is no valid reason why *Levy* should not be extended to encompass the father-child relationship as well. See e.g. *Weber v. Aetna Casualty & Surety Co.,* _____ U.S. _____, 31 L.Ed. 2d 768 (1972), especially with respect to the most important right of parental support.

The State implies that this Court's decision in *Labine v. Vincent,* 401 U.S. 532 (1971) undercuts the *Levy* case. However, in that case the Court itself stated: "We emphasize that this is not a case, like *Levy,* where the State has created an insurmountable barrier to this illegitimate child." *Labine v. Vincent, supra.* at page 539. But in Appellants' situation Texas has created such a barrier. The illegitimate child is totally prevented from securing paternal support even when paternity has been proved beyond any

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6. We are not faced with what has been described as a choice between one of two "arbitrary schemes" (see dissent in Levy and Glona at 391 U.S. 80, 81). The parental obligation to support one's children existed prior to, and therefore is not a creature of state statute. Hence, the choice offered is either to perpetuate a prejudicial scheme to exclude illegitimates, or to prohibit a state, in derogation of the Fourteenth Amendment, to continue an arbitrariness simply by codifying it in statutory form.

doubt. Furthermore, there can be no question that in *Labine* the Court placed considerable emphasis on the fact that the issue there concerned the disposition of property at death as articulated by Justice Powell in the *Weber* case:

> That decision reflected, in major part, the traditional deference to a State's prerogative to regulate the disposition at death of property within its borders. *Labine, supra.* page 538. The Court has long afforded broad scope to state discretion . . . in providing for "the stabiltiy of . . . land titles and prompt and definite determination of the valid ownership of property left by decedents," . . . *Weber v. Aetna Casualty & Surety Co., supra.* at page 776.

But while *Labine* deals with the aftermath of death, this case deals with the needs and obligations of life.[7]

In *Weber* the Court specifically applied *Levy* to include the father-child relationship. In doing so, Justice Powell, speaking for seven members of the Court, answered the very argument the State offers here[8] by stating:

> We do not think that *Levy* can be disposed of by such finely carved distinctions. The Court in *Levy* was not so much concerned with the tortfeasor going free as with the equality of treatment under the statutory recovery scheme. *Weber v. Aetna Casualty & Surety Co., supra.* at page 775.

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7. In fact, **Labine, supra.**, at page 533, acknowledges the illegitimate's needs of life and does nothing to interefere with the Louisiana scheme whereby the illegitimate, through an action for alimony against the "lawful" heirs of the natural father, could insure recompense for such needs. Therefore, the facts of **Labine** recognize and protect the the needs of the illegitimate as fully as the decisions of **Levy** and **Weber.**

8. The State suggests that **Levy's** application is limited to only the mother-child relationship (**Amicus** at page 4), and also suggests that **Levy's** application is further limited solely to the tort area (**Amicus** at page 8, 9). Furthermore, the State's contention that **Jerry Vogel Music Co. v. Edward B. Marks Music Corp.**, 425 F. 2d 834 (1969) as a further indication of restrictive applicability of **Levy** is patently incorrect, as that case is so clearly distinguishable on its facts as to make further mention of it totally unnecessary.

Thus in *Weber* the Court reaffirmed its position in *Levy*, thereby requiring, at a minimum, that the State's classification with respect to illegitimate children bear some rational relationship to a legitimate state purpose. *Weber v. Aetna Casualty & Surety Co., supra.* at page 777. See also *Morey v. Doud, supra.; Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955); *Gulf, Colorado & Santa Fe Ry. v. Ellis*, 165 U.S. 150 (1896); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

But what are the State's reasons for its different treatment respecting the illegitimate's right to paternal support? One of the traditional arguments advanced in justification of laws discriminating against illegitimate children is that it promotes morals by discouraging promiscuity. Judge Cadena in his dissent aptly repells such a farfetched contention by pointing out:

> Even if we assume, closing our eyes to the soaring illegitimate birth rate, that a woman will refrain from illicit sexual activity in order to avoid bearing a child who will be denied paternal support, there is no basis for the conclusion that the Equal Protection Clause permits resort to this practice of vicarious expiation. Nor can it be seriously contended that the governmental purpose of promoting marriage and discouraging sexual promiscuity is promoted by a rule which guarantees to the rake immunity from liability for the support of the children born as a result of his extramarital copulative performances. *G._____ v. P._____*, 466 S.W. 2d 41, 45 (1971).

Certainly, the unpersuasiveness of the State's argument is personified by the parents in this case. If the purpose of denying an illegitimate child the right to compel his natural father to support him when he is in need and want is to prevent moral decay or sin, then this is not an accomplishment of that purpose. For every man knows, that under the laws of the state of Texas, he may spawn through and seed the entire State, but if he does so without benefit of marriage, he is not responsible for the effects of his fecundity. In view of

the equal protection clause, how can we deny an illegitimate child the right to paternal support solely because he was conceived in sin, a sin which was not his but his parents? Such a denial is surely an invidious discrimination. *Levy v. Louisiana, supra* at page 68.

The argument that compelling a man to support his illegitimate progeny would tend to destroy the family is equally unpersuasive. There is nothing to show that in the 48 states, which have imposed such an obligation on the father of an illegitimate child, that they have experienced any greater disruption of the family than Texas which denies the right to paternal support to illegitimates. Indeed, the preservation of the family institution calls for it to prevail against many pressures of modern day life. But can we say that the State is permitted to aid to the extent of becoming a partner to concealing the wrong and in so doing punish the innocent illegitimate child? For to what extent does the irresponsible sexual activity of the father contribute to the stability of his legitimate family? If the true purpose of the discrimination against illegitimates regarding support is to preserve the family, then Texas shows no concern whatsover for the stability of the family of the illegitimate's mother, on whom the entire burden of support is placed.

It is asserted that paternal support for illegitimates must await legislation in order to insure ". . . provision for proper standards and safeguards for determining the paternity of an illegitimate." *G._____ v. P._____, supra.*, at page 42. Why should this be? Surely the courts cannot consider themselves incapable of resolving the issue of paternity by means of existing evidentiary principles for the Texas courts themselves have repeatedly faced this issue and repeatedly resolved it. For the paternity of a child becomes an issue in divorce litigation when ". . . a man, having by a woman a child or children shall afterwards inter-

marry with such woman, such child or children shall thereby be legitimated . . ." (Section 42, Texas Probate Code, Vernon's Annotated Texas Statutes). See, e.g. *Glona, supra., at* page 76; *Stanley v. Illinois,* _____ U.S. _____, 31 L. Ed 2d 551, 561 (1972).

Nor can it be said that the proposition of denying illegitimates the right of requiring paternal support can be justified by general considerations of public policy. Even the Texas Courts recognize this.

> ". . . Appellee was under a moral and natural obligation to support his infant son, though he may have been born out of wedlock; and so far from being against, it is in accordance with, the spirit of the law, as well as public policy, that he s h o u l d be treated as a member of the family of Appellee. *Lane v. Phillips, supra.,* at page 612.

Thus, there exists no valid rationale to justify any legitimate State purpose for depriving illegitimate children of their right to paternal support, other than pure prejudice. We maintain that such a situation is wholly intolerable in face of the equal protection clause. As Justice Powell succinctly phrased it:

> The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons b e y o n d the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust . . . . Courts are powerless to prevent the social opprobium suffered by these hapless children, but the Equal Protection Clause does enable us to strike down discrimintory laws relating to the status of birth. *Weber v. Aetna Casualty & Surety Co., supra.* page 779.

B. The placing of the burden of support of the illegitimate child wholly on the female parent has no rational relationship to a valid State purpose, and thereby constitutes an invidious discrimination in contradiction to the Equal Protection Clause.

Equally as onerous as the State's discrimination against the illegitimate child is its invidious scheme to place the entire burden of supporting such child on the female parent. To extoll the virtues of motherhood but be blind to its toils may be fact, but should it be law? Therefore the pertinent inquiry must be what possible legitimate state interest is promoted by singling out the female partner to acts of sexual promiscuity nad forcing her, and her alone, to bear the economic consequences. We submit there is none.

In Texas, it is well settled that the mother of an illegitimate child bears the entire legal burden of supporting and maintaining such child.

> . . . After the (natural father) had executed the agreement (to pay child support for an illegitimate child) he had only promised to do something that was not his legal obligation. Additionally, since the agreement to support ran to the mother, it was merely a promise to do something that she, and not the (father) was legally bound to do. *C.*____ *v. W.*____, 480 S.W. 2d 474, 478 (1972).

Perhaps the only justification the State can offer is the farfetched argument that if a paternal obligation to support was enforceable then, perchance, some opportunistic women might entrap the "innocent" male for pecuniary purposes.

This argument was implicitly made in *Glona* and *Weber*, and in both cases this Court found such a contention wholly untenable.

> . . . We see no possible rational basis . . . for assuming that if the natural mother is allowed recovery for the wrongful death of her illegitimate child, the cause of illegitimacy will be served. It would, indeed, be farfetched to assume that women have illegitimate children so that they can be compensated in damages for their death." *Glona v. American*

Guarantee and Liability Insurance Co., supra., page 75. *Weber, supra.*, at pages 777, 778.

No doubt this sexual discriminaton had its inception in the days of antiquity, when men were "free to sow their wild oats" while society endowed women, the weaker sex, with the duty to remain chaste, or at least guard against the "accidents of love." If this fossil is all that remains to justify the State's placement of the economic, burden of support, then the "rational relation" is relegated to differentiation purely on the basis of sex. As this Court has already held in *Reed v. Reed*, _____ U.S. _____, 30 L. Ed. 2d 225 (1971):

> To give a mandatory preference to members of either sex over members of the other . . . is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment . . . the choice in this context may not lawfully be mandated solely on the basis of sex. *Reed, supra.*, at page 230.

III.

The State's creation of a legal barrier which prevents an illegitimate child from seeking and obtaining paternal support, is arbitrary and capricious, bearing no real or substantial relation to the avowed State purpose, and hence denies the illegitimate his right to due process under the Fourteenth Amendment to the United States Constitution.

Closely related to equal protection is the concept of substantive due process which, except where justified or excused by some reasonable classification, requires equal appiication of the law. *Stanley v. Illinois, supra.; Bell v. Burson*, 402 U.S. 535 (1971); *Carrington v. Rash*, 380 U.S. 89 (1965); *Shapiro v. Thompson*, 394 U.S. 618 (1969). In the area of substantive due process, the

general rule is that state legislation is permissible if it is not unreasonable, arbitrary, or capricious, and the means selected have a real and substantial relation to the object sought to be obtained. *Nebbia v. New York*, 291 U.S. 502 (1934); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

As Appellants have already demonstrated *infra.*, the sole remaining reason for the invidious discrimination practiced by Texas against illegitimate children is one of historical ostracism.[9] In present day context this discriminatory scheme works purely to protect the "more favored" male, and in so doing it systematically oppresses the disadvantged class of illegitimate children. There can be no valid justifiable State interest in shielding the man, who is at least a co-equal in the societal wrong, while at the same time punishing the innocent child for a crime which was not his, but his parents.[10] Surely ". . . visiting this condemnation on the head of an infant is illogical and unjust." *Weber v. Aetna Casualty & Surety Co., supra.* at page 779.

The fact that Texas law so overwhelmingly favors the male over the more helpless child is evident from the case of *C.* _____ *v. W.* _____, *supra.* In that case the father, aside from factually acknowledging the illegitimate, voluntarily contracted to support the child. But Texas, in its unswervable position of favoritism-discrimi-

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9. "The bastard, like the prostitute, thief and beggar, belongs to that motley crowd of disreputable social types which society has generally resented, always endured. He is a living symbol of social irregularity, and undesirable evidence of contramoral forces; in short, a problem as old and involved as human existence itself." Davis, **Illegitimacy and the Social Structure**, 45 Am. J. of Sociology 215 (1939). Also see Krause, **Equal Protection for the Illegitimate**, 65 Mich. L. Rev. 477 (1967), and **Equal Protection and Paternity**, 36 U. of Chi. L. Rev. 338 (1969).

10. If any analysis to tort law can be made here, as the State attempts to do, then we submit Texas' discrimination against illegitimate children is tantamount to rewarding one of the joint tortfeasors at the expense of the victim.

nation, abrogated the contract, thereby releasing the man from any support obligation whatsoever. *C.____ v. W.____, supra.* If ever the State has erected as insurmountable barrier, then this is it.

In *Stanley v. Illinois, supra.*, this Court held that when "the presumption here created is . . . definitely conclusive — incapable of being overcome by proof of the most positive character." (citing *Carrington v. Rash, supra.* at page 96), then such arbitrariness contravenes the concepts of due process and equal protection. In the *Stanley* case this Court struck down Illinois' insurmountable barrier which automatically precluded the father of an illegitimate child from obtaining or retaining parental custody of the child.[11] If states are forbidden from creating an insurmountable barrier against the father of an illegitimate with respect to custodial rights, how then may Texas be permitted to maintain an insurmountable barrier against the illegitimate child with respect to his right to paternal support? To say such a discrimination is justified because of difficult problems of proof, is no answer. *Glona v. American Guarantee & Life Insurance Co., supra.; Weber v. Aetna Casualty & Surety Co., supra.*

> Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues . . . when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests

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11. In judging the impact of **Stanley v. Illinois, supra.**, on present Texas jurisprudence we observe a dilemma. Natural fathers have legally recognized custodial rights in illegitimates. How may the State, in protecting the best interests of such a child, terminate the custodial rights of a natural father who does not provide proper financial support? Either the State cannot and the child remains deprived and unprotected or the State will now legally recognize support obligations only in those limited situations where the support is not provided by a father with custody of the child. Needs are no greater because they are recognized and obligations no more binding because exposed.

of both parent and child. It therefore cannot stand. *Stanley v. Illinois, supra.* at page 562.[12]

Clearly then, the "problems of proof" argument is an evasion of the issue. For example Texas already deals with such problems of finding paternity in those cases where the sexual act is imposed upon the female against her will. In such cases the needs of the resulting offspring are used as a "measure of damages" for the father's tort once paternity has been established. *Jaffe v. Deckard,* 261 S.W. 390 (1924). Similarly, the issue of paternity is dealt with in protecting the natural father's homestead exemption. *Lane v. Phillips, supra.*

Hence, in these situations the Texas courts have faced the problems of determining paternity and in so doing, have implicitly recognized the natural obligation to support. Why then maintain an insurmountable barrier against the illegitimate child seeking support from his natural father? Should such a child be relegated to the position of begging for his irregularly bestowed scraps of morality, merely because of an accident of birth? The illegitimate child is entitled to due process.

IV.

Granting illegitimate children the right to seek and obtain paternal support, like that similarly enjoyed by legitimate children, would neither contradict this Court's decisions in the area of Welfare law, nor would it result in vast number of such children losing their AFDC benefits.

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12. For additional cases commenting on administrative convenience not constituting a sufficient state justification, at least when important rights are concerned, see **Goldberg v. Kelly,** 397 U.S. 254 (1970); **Bell v. Burson, supra.; Carrington v. Rash, supra.; Shapiro v. Thompson, supra.**

In their Memorandum as *Amicus Curiae* on behalf of Appellee, the State of Texas contends ". . . that this Court has already indicated its reluctance to extend the decisions in *Levy* and *Glona* beyond the facts presented in such cases." *Amicus* at page 5. As authority for this proposition they cite *King v. Smith*, 392 U.S. 309 (1968). The State then goes on to suggest if this Court applies *Levy* to encompass Appellants' constitutional claims, then this ". . . would require the reversal of *King*, or in the alternative would result in many present AFDC recipients being declared ineligible for such benefits." *Amicus* at page 8. We do not agree.[13]

The relevant facts in *King* show that under Alabama's "substitute father" regulation[14] a mother and her four children were denied AFDC benefits solely because she allegedly had sexual relations with a man, who was not the natural father of the children and thereby had no legal duty to support them, and who in fact was not supporting them. *King v. Smith, supra.* at pages 315-16. The State asserts that if the obligation of support is applied ". . . to the relationship between an illegitimate child and

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13. The crux of the State's argument in this respect is based upon the unfounded premise that if illegitimates had the right to seek paternal support, then Texas would be forced to, or permitted to strip literally thousands of these children from its AFDC rolls solely for this reason, and without further consideration as to whether or not they are actually receiving such paternal support and care. Hence, the State argues that the Court, not wanting to effect such a result, specifically declined to apply Levy in deciding King. As we shall demonstrate this analysis is patently in error.

14. At the time Alabama enforced its "substitute father" regulation to deny AFDC benefits to children of a mother who "cohabited" in or outside the home with any man. This regulation was applied regardless of the man's relationship with, or legal support obligation toward such children, and irrespective of whether or not he was actually supporting them. Indeed 20,000 recipients were deprived of AFDC by reason of this device. In disposing of the case under the applicable federal statutory provisions and their legislative history, the Court presented a rather detailed analysis of the fruitless attempts by states to curb the sins of parents by punishing their children through the Welfare System. King v. Smith, supra..

its (sic) natural father then the result in *King* would have been decidedly different." Jurisdictional Statement, page 6. However, we would emphasize that in the *King* case the "substitute father" was not the natural father of any of the children. Clearly then, even if an illegitimate child had the right to seek support from his father, such a paternal obligation would only extend to the child's natural father. Hence, a non-natural, non-adoptive father would still have no legal obligation toward supporting the child. Therefore, to suggest a revitalization of the "substitute father" rule under the very facts which brought about its demise is patently incorrect. *King v. Smith, supra.* Also see *Lewis v. Martin*, 397 U.S. 552 (1970); *Ojeda v. Hackney*, 319 F. Supp. 149 (N.D. Tex. 1970).

Furthermore, AFDC statistics do not support the State's contention. In Texas 93% of the AFDC children are being reared by the mother; 5.3% are in the care of their father; and only 1% have both their mother and father in the home.[15] Surely Texas cannot seriously claim that the mere existence of an illegitimate's right to seek paternal support would mean the loss of that child's AFDC even where his natural father does not live in the home and does not contribute to the child's maintenance. Such a contention would clearly contradict Sections 402(a) (10) and 406(a) of the Social Security Act, 42 U.S.C. *SS* 602(a) (10), 606 (a), which provide that aid to families with dependent children shall be furnished with reasonable promptness to all eligible individuals, and then defines "dependent child" as one who has been deprived of

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15. **"Breaking the Poverty Cycle in Texas"** (1970), page 18. This was the published report of the Senate Interim Committee on Welfare Reform, after their having made an authoritive and exhaustive study of Welfare in Texas. The 5.3% figure shown above represents those chidren who actually live with, and who are being cared for by their fathers. Athough the report cites that approximately 27% of the children on the AFDC rolls are illegitimate and recommends "strengthening the laws regarding the paternity obligation in cases of illegitimacy" (page 53), it characterizes the savings on State Welfare costs as "potential" not a guaranteed immediate windfall. (page 58).

parental support or care by reason of a parent's death, incapacity, or **continued absence from the home.** *King v. Smith, supra. Damico v. California,* 389 U.S. 416 (1967); *Meyers v. Juras,* 327 F. Supp. 59 (D. Ore. 1971), aff'd _____ U.S. _____, 30 L. Ed 2d 39, reh. den. 280. Moreover, if the State's contention is correct, then how does one explain the vast numbers of legitimate children receiving AFDC whose fathers are not dead or incapacitated, for there certainly is a paternal obligation to support in these cases.

In the *King* case, the question before this Court was whether Alabama's "substitute father" regulation contravened various provisions of the Social Security Act, 42 U.S.C. *SS*601-609, and the Fourteenth Amendment of the United States Constitution. The Court achieved a satisfactory disposition of the case on the statutory grounds, thereby making it unnecessary to consider the constitutional claim. *King v. Smith, supra.* at page 333. But surely the fact that the decision in *King* was based on the narrower statutory grounds rather than on the constitutional claim cannot be taken as demonstrable evidence of the Court's "reluctance" to apply *Levy* to the proper case. See e.g. *Weber v. Aetna Casualty & Surety Co., supra.* For even in *King,* the Court, at least by implication, recognized that Alabama's desire to promote morality by disqualifying innocent, needy children from AFDC simply did not have a sound or legitimate basis.

To punish the illegitimate child for an act over which he had no control, an act committed patently before his birth, and an act committed not by him but by two other people can only be viewed as an intolerable situation under our Constitution and laws.

CONCLUSION

For the foregoing reasons, Appellants respectfully request that the decision below be reversed.

Respectfully submitted, August, 1972,

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